

# *Nova Law Review*

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*Volume 8, Issue 2*

1984

*Article 10*

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## Florida Nonsmokers Need Legislative Action to “Clear the Air”

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Curtis R. Cowan

## **Abstract**

Even with the onset of the health-conscious '80s, approximately thirty-eight percent of adult males and thirty percent of adult females actively smoke tobacco products.

**KEYWORDS:** air, clear, nonsmokers

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## I. Introduction

Even with the onset of the health-conscious '80s, approximately thirty-eight percent of adult males and thirty percent of adult females actively smoke tobacco products.<sup>1</sup> Although these figures are down from their 1965 counterparts of fifty-two and thirty-four percent,<sup>2</sup> active smokers make up a substantial minority of the population. More than thirty million Americans have quit smoking,<sup>3</sup> and millions more are trying. The major catalyst for this decline was the 1964 Surgeon General's report which revealed the dangers of tobacco smoking to the public for the first time.<sup>4</sup> This information eventually led the federal government to require warning labels on cigarette packs and abolish cigarette television commercials.<sup>5</sup> Unfortunate discoveries about tobacco smoke continued, with the possibility of harm to nonsmokers first suggested in the 1972 Surgeon General's Report.<sup>6</sup> The 1979 Surgeon General's report<sup>7</sup> and many scientific and medical studies confirmed that suspicion.<sup>8</sup>

As a result of these findings, nonsmokers, previously willing to endure the annoyance caused them by the smell and irritation of tobacco smoke, realized that they were smoking tobacco products involuntarily, simply by being exposed to tobacco smoke.<sup>9</sup> A proliferation of legal

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1. PUBLIC HEALTH SERVICE, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, *THE HEALTH CONSEQUENCES OF SMOKING: CARDIOVASCULAR DISEASE* 367 (1st ed. 1983) [hereinafter cited as 1983 REPORT].

2. *Id.*

3. PUBLIC HEALTH SERVICE, U.S. DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, *SMOKING AND HEALTH* vii (1979) [hereinafter cited as 1979 REPORT].

4. PUBLIC HEALTH SERVICE, U.S. DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, *SMOKING AND HEALTH* (1964). "On the basis of prolonged study and evaluation of many lines of converging evidence, the Committee makes the following judgment: Cigarette smoking is a health hazard of sufficient importance in the United States to warrant appropriate remedial action." *Id.* at 33

5. PUBLIC HEALTH SERVICE, U.S. DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, *THE SMOKING DIGEST* 34 (1979) [hereinafter cited as *SMOKING DIGEST*].

6. PUBLIC HEALTH SERVICE, U.S. DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, *THE HEALTH CONSEQUENCES OF SMOKING* 121-31 (1972) [hereinafter cited as 1972 REPORT].

7. 1979 REPORT, *supra* note 3, at 11—5-35.

8. *See infra* text accompanying notes 11-70.

9. Actually the terms nonsmoker and smoker are inaccurate since everyone inhales tobacco smoke and is, therefore a smoker. Involuntary smoker and voluntary smoker are more accurate terms. *See* 1979 REPORT, *supra* note 3, at 11—5. To avoid confusion this note refers to the involuntary smoker as the nonsmoker.

actions began when nonsmokers learned of the many harmful effects of secondary smoke they are forced to inhale.<sup>10</sup> Nonsmokers' efforts to obtain relief through the courts and their legislatures have met with inconsistent results.

This note discusses the major issues of nonsmokers' rights, as developed through the courts and legislatures, and explores the possible emerging issue of the relationship between parental smoking and the negligent treatment of children. As a primary objective, this note focuses upon the current rights of nonsmokers in Florida and advocates the enactment of a Florida Clean Indoor Air Act.

## II. The Underlying Premise: Injury to the Nonsmoker

Regardless of which legal forum the nonsmoker elects to seek relief, essential to his argument is the premise that unavoidable contact with secondary tobacco smoke is harmful to his health, significantly enough to warrant government intervention. Perhaps because smoking is still a legitimate social activity and perhaps because the tobacco industry's power and influence through advertising keeps it legitimate, the general public remains very much unaware of the extent to which tobacco smoke is believed harmful to the nonsmoker. Although an in-depth study of the medical and scientific evidence is better suited for a medical journal, a basic understanding of the nonsmoker's underlying premise is so crucial to his argument that a brief overview of the evidence is necessary.

### A. Tobacco Smoke Pollution

The United States Surgeon General's 1975 report asserts that tobacco smoke is a major cause of indoor air pollution.<sup>11</sup> In fact, indoor smoke pollution is potentially more harmful than outdoor pollution, even on air-pollution emergency days.<sup>12</sup> Scientists have discovered over 4,000 substances in tobacco smoke.<sup>13</sup> Many of these substances are very toxic. "Upwards of 90% of cigarette smoke is composed largely of a dozen gases that are hazardous to health, and the remainder is par-

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10. See SMOKING DIGEST, *supra* note 5, at 77-91.

11. U.S. DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, PUBLIC HEALTH SERVICES, THE HEALTH CONSEQUENCES OF SMOKING 108 (1975).

12. See SMOKING DIGEST, *supra* note 5, at 26, and Repace & Lowrey, *Indoor Air Pollution, Tobacco Smoke, and Public Health*, 208 SCIENCE 464 (1980).

13. 1983 REPORT, *supra* note 1, at 209, 232.

ticulate matter. . . ."<sup>14</sup> Some of the hazardous chemicals in tobacco smoke include "tar, nicotine, carbon monoxide, nitrogen dioxide, ammonia, benzene, formaldehyde, and hydrogen sulphide."<sup>15</sup> Hydrogen cyanide, polonium, hydrocyanic acid, and aldehydes are other toxic substances found in tobacco smoke.<sup>16</sup>

Tobacco smoke permeates the air from two sources: sidestream smoke and mainstream smoke.<sup>17</sup> Sidestream smoke invades the air directly from the burning end of the tobacco product. Mainstream smoke is first inhaled by the smoker, then enters the atmosphere when exhaled. Today's common knowledge that mainstream cigarette smoking is harmful is no great wonder. Yet "[e]ighty to ninety percent of the volatile and particulate agents and 50% of the carbon monoxide are filtered out of inhaled smoke before reaching the smoker's lungs. Thus, the sidestream smoke has twice the toxic material, or more, than the inhaled or mainstream smoke."<sup>18</sup>

Most of the tobacco smoke pollution comes from sidestream smoke. "Even when a smoker inhales into the lung, two-thirds of the smoke from the burning cigarette goes directly into the environment. The ratio of pollution from cigar and pipe smoke is even greater. . . ."<sup>19</sup> Usually a smoker inhales each cigarette "8-9 times. . . .for a total of 24 seconds, but the cigarette burns for 12 minutes and pollutes the air continuously. . . ."<sup>20</sup> Both smokers and non-smokers inhale this unfiltered smoke. "Inhalation of atmospheric pollutants from the smoke of tobacco products is referred to as passive (involuntary, secondhand) smoking."<sup>21</sup>

14. SMOKING DIGEST, *supra* note 5, at 17.

15. Epstein, *The Effects of Tobacco Smoke Pollution on the Eyes of the Allergic Non-Smoker*, 2 SMOKING AND HEALTH, 337, 338 (1975).

16. Tate, *The Effects of Tobacco Smoke on the Non-Smoking Cardio-Pulmonary Public*, 2 SMOKING AND HEALTH 329, 332 (1975).

17. 1979 REPORT, *supra* note 3, at 11—5.

18. Tate, *supra* note 16, at 332. See 1983 REPORT, *supra* note 1, at 211, for a chart comparing toxic levels of sidestream and mainstream smoke.

Arguably the major cause of harm to the smoker is sidestream smoke. Studies conclude that smoking is harmful, but the apportionment of that harm between mainstream smoke and sidestream smoke is not known. Perhaps if smokers could inhale only the filtered mainstream smoke, the harm would not be as great. Smokers, however, are unavoidably exposed to high concentrations of sidestream smoke from the burning ends of cigarettes.

19. Epstein, *supra* note 15, at 338.

20. *Id.*

21. Lefcoe, Ashley, Pederson & Keays, *The Health Risks of Passive Smoking*:

## B. Known and Suspected Risks of Passive Smoking

Cancer is widely believed to be the primary risk of tobacco smoke. Probably nothing is further from the truth. Although cancer is a known, serious risk of tobacco smoke, a multitude of other harms exist which are more common, and some are just as deadly. Research is unfolding the sad news that these harms are adversely affecting the non-smoker as well as the smoker. Considering the physical nature of tobacco smoke described, one should not be surprised. In heavily smoke-filled rooms "in a relatively short time a non-smoker can inhale the equivalent of 5-6 cigarettes."<sup>22</sup>

### 1. Carbon Monoxide Poisoning

One known risk to the nonsmoker from passive smoking is his exposure to higher levels of carbon monoxide. Carbon monoxide averages "5 volumes percent in mainstream and 10 to 15 volumes percent by weight in side-stream smoke."<sup>23</sup> "Safe limits for levels in working areas have been set at 8.7 ppm [parts per million] for 8 hours, or 35 ppm for 1 hour. . . ."<sup>24</sup> Yet the "concentration in inhaled tobacco smoke is 400 ppm."<sup>25</sup> Enclosed areas with heavy smoke concentrations often reach levels of 50 ppm to 100 ppm.<sup>26</sup> A nonsmoker who works five eight-hour days in a room with smokers cannot avoid inhaling a great amount of tobacco smoke, and thus high levels of carbon monoxide. Inhaling carbon monoxide raises the level of venous-blood carboxyhemoglobin (COHb) in the blood.<sup>27</sup> The normal level of COHb in nonsmokers is

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*The Growing Case for Control Measures in Enclosed Environments*, 84 CHEST 90 (July 1, 1983).

22. Tate, *supra* note 16, at 332.

23. Lefcoe, *supra* note 21, at 90.

Carbon monoxide is a common industrial pollutant generated by any burning process. It is odorless and tasteless and gives no warning of its presence in most circumstances, thus allowing for chronic exposure over extended periods of time. The early symptoms of carbon monoxide poisoning often resemble those of a variety of diseases; thus tissue hypoxia might occur in healthy persons without forewarning. . . .

1983 REPORT, *supra* note 1, at 244 (footnote omitted).

24. Tate, *supra* note 16, at 331.

25. *Id.*

26. *Id.*

27. See 1979 REPORT, *supra* note 3, at 11—15-24; SMOKING DIGEST, *supra* note 5, at 17. "Atherosclerosis is a multifactorial disorder in which cigarette smoking and

between .5% and 2.0%.<sup>28</sup> Smokers' normal levels range between 2.0% and 15% depending on the average number of cigarettes smoked.<sup>29</sup>

These levels change when passive smoking begins. One study placed nine smokers and twelve nonsmokers in a room. The subjects remained in the room for about one hour, and during that time the ambient carbon monoxide concentration from the smokers' tobacco smoke reached 38 ppm.<sup>30</sup> "The mean COHb of the twelve non-smokers increased from 1.6% to 2.6%, while the six cigarette smokers . . . increase[d] from a mean of 5.9% to 9.6 %."<sup>31</sup>

The effect of even low levels of COHb can be very hazardous to one's health.<sup>32</sup> Because of the lack of oxygen that results from higher levels of COHb, everyone may be more susceptible to cardiovascular disease. This threat is even greater for individuals with a pre-existing cardiovascular problem.<sup>33</sup> One study of ten angina patients exposed to the sidestream smoke of only fifteen cigarettes over two hours in a well-ventilated room still showed an increase in "resting heart rate, systolic and diastolic blood pressure, and venous carboxyhemoglobin and decreased their heart rate and systolic blood pressure at angina."<sup>34</sup> "The duration of exercise until angina was decreased 22 percent. . . ."<sup>35</sup> Of course, even larger increases and decreases occurred in an unventilated room with a 38% decrease in the exercise duration.<sup>36</sup> The study concluded that "[p]assive smoking aggravates angina pectoris."<sup>37</sup>

Tobacco smoke may be a direct cause of many auto accidents.<sup>38</sup> Evidence shows that reaction time and other sensory abilities necessary

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carboxyhemoglobin levels may exert varying effects, depending upon the other risk factors present. Carbon monoxide is believed to be a contributing factor to the acceleration of the disease process." 1983 REPORT, *supra* note 1, at 225.

28. SMOKING DIGEST, *supra* note 5, at 17.

29. *Id.*

30. Russell, Cole & Brown, *Absorption by Non-Smokers of Carbon Monoxide from Room Air Polluted by Tobacco Smoke*, 1 THE LANCET 576 (1973).

31. *Id.*

32. See 1979 REPORT, *supra* note 3, at 11—29; 1983 REPORT *supra* note 1, at 221-26.

33. 1979 REPORT, *supra* note 3, at 11—29.

34. Aronow, *Effect of Passive Smoking on Angina Pectoris*, 299 NEW ENG. J. MED. 21 (1978).

35. *Id.*

36. *Id.*

37. *Id.*

38. See 1979 REPORT, *supra* note 3, at 11—28-29; Tate, *supra* note 16, at 331.



for driving are impaired when COHb levels reach 2.0% to 3.0%.<sup>39</sup> Considering the carbon monoxide levels several smokers in a car can create, one may reasonably hypothesize that even a nonsmoking driver's COHb level may reach well above 2.0%.

In addition, doctors at the University of South Florida College of Medicine observed acute Raynaud's phenomenon<sup>40</sup> in both the former and current nonsmoking wives of a heavy smoker.<sup>41</sup> The first wife's symptoms disappeared after divorce; the second wife's symptoms subsided after the husband began smoking in a separate room.<sup>42</sup>

## 2. Respiratory Disease

Many of the toxic substances permeating the air in tobacco smoke are known to be damaging to the lungs. Hydrogen cyanide, for example, is a poison which destroys cells of the lining of the respiratory systems.<sup>43</sup> It is believed that exposure to only 10 ppm of hydrogen cyanide over a long period causes this damage, and tobacco smoke may contain as much as 1600 ppm.<sup>44</sup> Nitrogen dioxide (250 ppm in tobacco smoke) is linked to emphysema.<sup>45</sup> Cadmium, another toxic substance found in tobacco smoke, possibly "damages the air sacs in the lungs and causes emphysema. Once cadmium gets into the lungs it remains there."<sup>46</sup>

A study correlated a relationship between damage to the small airways in the lungs and passive smoking of nonsmokers.<sup>47</sup> The researchers examined 2,100 subjects and found that "nonsmokers chronically exposed to tobacco smoke had a lower forced mid-expiratory flow rate. . . than nonsmokers not exposed. . . ." <sup>48</sup> The study "conclude[s]

39. 1979 REPORT, *supra* note 3, at 11—28; 1972 REPORT, *supra* note 6 at 127; Russell, *supra* note 30, at 579.

40. "Raynaud's phenomenon is described as intermittent attacks of pallor and cyanosis of the hand and fingers due to spasmodically diminished blood flow and eventually reddening during the recovery stage." GRAY, 3b ATTORNEYS' TEXTBOOK OF MEDICINE (MB) ¶ 100.70 (1983).

41. Boganegra & Espinoza, *Raynaud's Phenomenon In Passive Smokers*, 303 NEW ENG. J. MED. 1419 (1980) (letter to editor).

42. *Id.*

43. Tate, *supra* note 16, at 332; SMOKING DIGEST, *supra* note 5, at 18.

44. Tate, *supra* note 16, at 332.

45. *Id.*

46. Epstein, *supra* note 15, at 338.

47. White & Froeb, *Small-Airways Dysfunction in Nonsmokers Chronically Exposed to Tobacco Smoke*, 302 NEW ENG. J. MED. 720 (1980).

48. *Id.*

that chronic exposure to tobacco smoke in the work environment is deleterious to the nonsmoker and significantly reduces small-airways function."<sup>49</sup>

### 3. Cancer

Studies of nonsmoking women, some married to smokers and others married to nonsmokers, suggest a real risk of cancer from passive smoking.<sup>50</sup> One prospective fourteen-year study found that nonsmoking wives of husbands who smoked less than one pack a day had one and one half times the risk of lung cancer than nonsmoking wives of nonsmoking husbands.<sup>51</sup> When the husbands smoked more than one pack per day, the risk was twice as great.<sup>52</sup> A subsequent similar study "[e]stimates. . . the relative risk. . . associated with having a husband who smokes were 2.4 for a smoker of less than one pack and 3.4 for. . . husbands smok[ing] more than one pack of cigarettes per day."<sup>53</sup>

### 4. General Illness

In addition to the effects mentioned, evidence suggests tobacco smoke exposure "significantly lower[s] the level of antibody production to influenza virus A2 . . .",<sup>54</sup> suppresses the lymphocytes function in the immune process,<sup>55</sup> and "affects the body's ability to utilize Vitamin C."<sup>56</sup> The obvious result is an increased risk of common illness. Indeed, a 1965 study "estimate[s]. . . that smoking-related illness or disease each year costs the United States 77 million workdays lost, 88 million days spent ill in bed, and 306 million days of restricted activity."<sup>57</sup> Another estimate suggests "that more than 10% of all hospital and medi-

49. *Id.*

50. See Lefcoe, *supra* note 21, at 92; Repace, The Problem of Passive Smoking 2 (1981) (unpublished paper presented at the Symposium on Health Aspects of Indoor Air Pollution, The New York Academy of Medicine, May 28-29, 1981).

51. Repace, *supra* note 50, at 23 (citing Hirayame, *Nonsmoking Wives of Heavy Smokers Have a Higher Risk of Lung Cancer: A Study from Japan*, 282 BRITISH MED. J. 183 (1981)).

52. Repace, *supra* note 50, at 2.

53. Trichopoulos, *Lung Cancer and Passive Smoking*, 27 INT. J. CANCER 1 (1981).

54. See Tate, *supra* note 16, at 333.

55. *Id.*

56. SMOKING DIGEST, *supra* note 5, at 22.

57. *Id.* at 23.

cal expenses in the United States are tobacco-related. This raises the overall cost of health insurance and taxpayer-supported health programs."<sup>58</sup> Logic suggests that long-term passive smoking at home or at work not only reduces a nonsmoker's ability to stay healthy, but also costs him money.

## 5. *Allergies*

Tobacco smoke is extremely aggravating to those who suffer from allergies, and many of these people may not be aware that tobacco smoke is the source of their aggravation.<sup>59</sup> "The American Medical Association estimates that at least 34 million Americans are sensitive in one way or another to cigarette smoke."<sup>60</sup> For these people, passive smoking "can precipitate acute attacks of asthma requiring an emergency visit to a physician's office or hospital emergency room. . . ."<sup>61</sup> "Tobacco smoke from any source is like salt rubbed into a raw sore."<sup>62</sup> Certainly thirty-four million Americans is a large enough minority to receive protection.

## 6. *Special Hazards to Children*

Although an adult has a choice whether to live in a home fraught with tobacco smoke, the fetus, infant and minor child do not. Children respire more than adults, and therefore, inhale more secondary smoke.<sup>63</sup> Young children of smoking parents also probably spend more time in smoke-filled environments than nonsmoking adults who have a choice. "It has already been conclusively proven that in homes where smoking occurs, children are seriously affected."<sup>64</sup>

Some of the research concludes as follows: Children who grow up in households with at least one heavy smoker have 46% more restricted days and 43% more bedridden days than children who grow up in smoke-free homes.<sup>65</sup> "Babies born to women who smoke during pregnancy are, on the average, 200 grams lighter than babies born to com-

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58. *Id.*

59. See Tate, *supra* note 16, at 329-30.

60. Epstein, *supra* note 15, at 337.

61. Tate, *supra* note 16, at 329.

62. *Id.* at 330.

63. 1979 REPORT, *supra* note 3, at 11-31.

64. Tate, *supra* note 16, at 334.

65. Repace, *supra* note 50, at 4 (citing Bonham & Wilson, *Children's Health in Families with Cigarette Smokers*, 71 AM. J. PUB. HEALTH 290 (1981)).

parable women who do not smoke.”<sup>66</sup> “The infants of mothers who smoke [have]. . .significantly more [hospital] admissions for bronchitis or pneumonia. . . .”<sup>67</sup> Mothers who smoke have a higher “risk of having stillborn children . . . , and their infants have higher neonatal death rates.”<sup>68</sup> Research suggests that fetuses and children who do survive are damaged by the lower levels of Vitamin C.<sup>69</sup>

Even more distressing is the evidence that passive smoking by children has long-term, permanent effects.<sup>70</sup> For example, smokers’ children show “measurable deficiencies in physical growth, intellectual and emotional development, and behavior.”<sup>71</sup> “Children whose mothers smoked 10 or more cigarettes a day during pregnancy were on the average 1.0 centimeter shorter [ages 7 and 11 years] and 3 to 5 months retarded in reading, mathematics, and general ability as compared with the offspring of nonsmokers.”<sup>72</sup>

More studies of the ill effects of passive smoking on children exist. Typical is the latest suggestion “that passive exposure to maternal cigarette smoke may have important effects on the development of pulmonary function in children.”<sup>73</sup> The study states:

The data. . . , which suggest that after five years, the lungs of non-smoking children with mothers who smoke grow at only 93 per cent of the rate of growth in nonsmoking children with mothers who do not smoke, are certainly plausible in terms of the magnitude of the effect that one might predict for an environmental pollutant such as cigarette smoke. The size of the effect is consistent with that hypothesized to be sufficient as an underlying risk predictor for obstructive airways disease in adult life.<sup>74</sup>

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66. PUBLIC HEALTH SERVICES, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, *THE HEALTH CONSEQUENCES OF SMOKING FOR WOMEN* 191 (1980) [hereinafter cited as 1980 REPORT].

67. Harlap & Davies, *Infant Admissions to Hospital and Maternal Smoking*, 1 *THE LANCET* 529 (1974).

68. Smoking Digest, *supra* note 5, at 26; See also 1980 REPORT, *supra* note 66, at 191.

69. SMOKING DIGEST, *supra* note 5, at 26.

70. 1980 REPORT, *supra* note 65, at 196-225.

71. *Id.* at 196.

72. *Id.* at 199.

73. Tager, Weiss, Munoz, Rosner & Speizer, *Longitudinal Study of the Effects of Maternal Smoking on Pulmonary Function in Children*, 309 *NEW ENG. J. MED.* 699 (1983).

74. *Id.* at 702.

Recent evidence reveals that significant levels of thiocyanate (SCN), a bioproduct of tobacco smoke, appear in the fetuses of non-smoking mothers who are exposed to passive smoking.<sup>75</sup> A logical conclusion is that even mothers who have quit smoking or have never smoked subject their unborn to these harms if they live or work in smoke-filled environments.

Most studies demonstrate that although the risks of harm from tobacco smoke are still greater to the smoker, risks to the nonsmoker are real and significant. As concluded in a recent cardiopulmonary journal, "[t]here is still much research to be done into the health effects of passive smoking; however, the need for such research should not be used as an excuse of inaction."<sup>76</sup> At the very least, the present scientific evidence supports an overwhelming likelihood that passive smoking causes a substantial and irreparable harm to nonsmokers. This familiar legal standard of harm<sup>77</sup> has created legal conflicts between smokers and nonsmokers.

### III. Nonsmokers' Attempts to Gain Judicial Relief

#### A. Federal Courts Decline to Recognize Fundamental Right

Despite the medical evidence, nonsmokers have been unsuccessful in establishing rights based on the United States Constitution. For example, the nonsmoking plaintiffs in *Gaspar v. Louisiana Stadium and Exposition District*<sup>78</sup> sought a smoking ban in the Louisiana Superdome. Plaintiffs asserted that secondary tobacco smoke causes physical harm and discomfort; interferes with the enjoyment of events; and, therefore, violates the rights guaranteed under the first, fifth, ninth and fourteenth amendments of the Constitution.<sup>79</sup> Essentially, *Gaspar* nonsmokers attempted to shade themselves under the penum-

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75. Bottoms, Kuhnert, Kuhnert & Reese, *Maternal Passive Smoking and Fetal Serum Thiocyanate Levels*, 144 AM. J. OBSTET. GYNECOL. 787 (1982).

76. Lefcoe, *supra* note 21, at 94.

77. Nonsmokers usually seek an injunction as a remedy to prevent the use of tobacco products. To receive an injunction in Florida, as in most jurisdictions, one must demonstrate a reasonable probability of irreparable harm. *Davis v. Wilson*, 139 Fla. 698 700, 190 So. 716, 719 (1939); *Paul's Drugs Inc. v. Southern Bell Tel. & Tel. Co.*, 175 So. 2d 203, 206 (Fla. 3d Dist. Ct. App. 1965).

78. 418 F. Supp. 716 (E.D. La. 1976), *cert. denied*, 439 U.S. 1073 (1979).

79. *Id.* at 717.

bral privacy rights first surfacing in *Griswold v. State of Connecticut*.<sup>80</sup> Declining to extend that right to the tobacco smoking controversy, the district court stated: "To hold that the First, Fifth, Ninth or Fourteenth Amendments recognize as fundamental the right to be free from cigaret smoke would be to mock the lofty purposes of such amendments and broaden their penumbral protections to unheard-of boundaries."<sup>81</sup>

A group of nonsmoking federal employees attempting to have smoking in federal buildings restricted to designated areas met with rejection of their constitutional argument in *Federal Employees for Nonsmokers' Rights (FENSR) v. United States*.<sup>82</sup> *FENSR* plaintiffs alleged two constitutional violations: 1) by failing to provide a safe, smoke-free environment the government has impaired plaintiffs' first amendment right to petition and receive redress for their grievances,<sup>83</sup> and 2) through the same failure, the government has "discriminated against them and denied them their life, liberty and property without due process of law in violation of the fifth amendment."<sup>84</sup> Relying on and quoting extensively from *Gaspar*, the *FENSR* district court granted the government's motion to dismiss the constitutional claims.<sup>85</sup> In part, the *FENSR* and *Gaspar* courts based their conclusions on previous decisions holding that no claim to *any* clean environment is constitutionally grounded.<sup>86</sup>

Unfortunately, both opinions express some of the common misconceptions clouding the issue. For example, *Gaspar* relies on and *FENSR* repeats the hackneyed comparison between alcohol and cigarettes suggesting that the allowance of smoking is no different than the allowance of drinking beer, and, therefore, no more a violation of constitutional rights.<sup>87</sup> However, the comparison of an individual's right to drink alcohol in public and his right to smoke tobacco does not address

80. 381 U.S. 479, 484 (1965). Justice Douglas' analysis of penumbral rights in *Griswold* opened the door for the fundamental right to privacy litigation. See *Gaspar*, 418 F. Supp. at 721.

81. *Gaspar*, 418 F. Supp. at 721.

82. 446 F. Supp. 181 (D.D.C. 1978), *aff'd*, 598 F.2d 310 (2d Cir. 1979), *cert. denied*, 444 U.S. 926 (1979).

83. *Id.* at 183-84.

84. *Id.* at 184.

85. *Id.* at 184-85.

86. *Id.* at 184 (relying on *Ely v. Velde*, 451 F.2d 1130, 1139 (4th Cir. 1971)); *Gaspar*, 418 F. Supp. at 720 (relying on *Tanner v. Armco Steel Corp.*, 340 F. Supp. 532, 536-37 (S.D. Tex. 1972)).

87. *Gaspar*, 418 F. Supp. at 718; *FENSR*, 446 F. Supp. at 184.

the essential complaint of nonsmokers. The distinction is simple and basic. When an individual exercises his right to drink alcohol, any ill effects directly caused by the dangers of alcohol are hazardous only to that individual. The risks that individual takes are self-contained. The same is not true with tobacco. When an individual exercises the decision to smoke tobacco he inescapably subjects other individuals who breathe the air in his vicinity to the hazards of tobacco smoke. His choice to injure himself entails a concomitant injury to others. The issue is not whether an individual has the right to subject himself to the known hazard; the issue is whether in the process of doing so he has the right to subject others to the same known hazard. An individual may legally drink alcohol only to the degree he does not harm others. To apply the analogue of this principle is the goal of nonsmokers. Any comparison of smoking to other social activities which do not contain this necessary similarity is misleading.<sup>88</sup>

Whether *Gaspar* and *FENSR* have closed the door on nonsmokers' chances of prevailing on a constitutional basis is not certain. Any future recognition of a constitutional right to be free from cigarette smoke will depend on more than relevant comparisons. Nonsmokers must surmount the initial problem of establishing smoking as a form of "state action" since constitutional protections against a private interference do not exist.<sup>89</sup> Perhaps the taxing of tobacco products makes public smoking an act authorized by the government.<sup>90</sup> Assum-

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88. UCLA Associate Dean, economist and Tobacco Institute consultant, Lewis Solmon, was recently quoted as saying: "It scares me if a president of a company implements a [no smoking] policy that takes away your individual rights [;]. . . [w]hat's next, limiting the consumption of red meat in the company cafeteria?" Brophy, *A Burning Issue: Smokers Say It's Their Right as More Employers Snuff It Out*, USA Today, Jan. 13, 1984, at 3B, col. 3. This typical, misleading statement fails to recognize that no matter how close one sits to an individual who chooses to eat red meat, any potential hazard from its consumption will not harm the bystander who chooses not to eat red meat.

89. See generally *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 721-22 (1961) (fourteenth amendment inhibits only state actions, not individual actions). *Gaspar* raised the issue of state action but declined to address it since the court found that there would be no constitutional violation in any event. 418 F. Supp. at 717, 722. In *FENSR*, state action was not an issue.

90. See Sapolsky, *The Political Obstacles to the Control of Cigarette Smoking in the United States*, 5 J. HEALTH POLITICS, POLICY AND LAW 277 (1980). The federal government receives over two billion dollars a year in excise taxes alone from cigarette sales. *Id.* at 285. In *Burton*, a private restaurant operator's practice of racial discrimination was found to be state action because public funds supported the building and

ing state action was judicially acknowledged, nonsmokers would then have to convince the courts to re-evaluate present-day scientific and medical evidence and find the harm great enough to warrant placing nonsmokers' interests within the penumbral protections of the Constitution. Although *Akron v. Akron Center for Reproductive Health, Inc.*,<sup>91</sup> demonstrates the Supreme Court's willingness to adapt prior decisions to fit "present medical knowledge,"<sup>92</sup> the Court has been unwilling to extend the penumbral fundamental rights concept beyond the areas of family relationships and abortions. Smoking falls into neither category; consequently, it is unlikely that recognition of a constitutional right to be free of involuntary smoking will be forthcoming.

## B. Footholds Gained in State Court Actions

### 1. *Common-law Theories Lead to Success for Workers*

Although no constitutional right to a smoke-free environment presently exists, some nonsmokers have achieved a smoke-free workplace through the common law applied in their state courts. The syllogism is simple: All employers have a common-law duty to provide employees with a safe place to work. Tobacco smoke in the workplace creates an unsafe condition. Therefore, an employer must provide employees with a smoke-free workplace.

*Shimp v. New Jersey Bell Telephone Co.*<sup>93</sup> is the landmark case which established this syllogism. Through standard grievance procedures, Donna Shimp, a secretary for the telephone company, had complained of tobacco smoke in her work area. In response, her employer

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grounds he leased. 365 U.S. 715. A number of years later, however, the Supreme Court held that a state's granting of a liquor license to a private club was insufficient to make that club's discrimination practices a state action. *Moose Lodge v. Iris*, 407 U.S. 163 (1972). Subsequent decisions signal a retreat from the liberal interpretation of state action in *Burton*, suggesting that failure to enact and enforce smoking regulations in private facilities would not be found to be state action giving nonsmokers a remedy under the fourteenth amendment. See, e.g., *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982) (private school's fiscal dependence on government insufficient to make discharge of teachers a state action).

91. \_\_\_ U.S. \_\_\_, 103 S. Ct. 2481 (1983). Because of new and safer procedures, *Akron* expanded a woman's right to receive an abortion at an outpatient facility during the second trimester even though the state's interest in the fetus at that time is "compelling." *Id.* at \_\_\_, 103 S. Ct. at 2495.

92. *Id.* at \_\_\_, 103 S. Ct. at 2496.

93. 145 N.J. Super. 516, 368 A.2d 408 (N.J. Super. Ct. Ch. Div. 1976).



installed an exhaust fan, but for various reasons the remedy failed.<sup>94</sup> Unhappy and ill from involuntarily breathing her co-workers' secondary smoke, Ms. Shimp brought suit against the telephone company. She alleged that the company's permitting employees to smoke at their workstations created an unsafe condition, "deleterious to her health,"<sup>95</sup> and that the company, therefore, breached its common-law duty to provide her a safe place to work.<sup>96</sup>

After recognizing an employer's "affirmative duty to provide a work area that is free from unsafe conditions,"<sup>97</sup> the *Shimp* court took "judicial notice of the toxic nature of cigarette smoke and its well-known association with emphysema, lung cancer and heart disease."<sup>98</sup> Relying on the various Surgeon General's reports, and the affidavits of various experts,<sup>99</sup> the court further stated that "mere presence of cigarette smoke in the air pollutes it, changing carbon monoxide levels and effectively making involuntary smokers of all who breathe the air."<sup>100</sup> "[It] also. . . adds tar, nicotine and the oxides of nitrogen to the available air supply."<sup>101</sup> The court concluded:

The evidence is clear and overwhelming. Cigarette smoke contaminates and pollutes the air, creating a health hazard not merely to the smoker but to all those around her who must rely upon the same air supply. The right of an individual to risk his or her own health does not include the right to jeopardize the health of those who must remain around him or her in order to properly perform the duties of their jobs.<sup>102</sup>

The first progeny of the *Shimp* decision is a Missouri case, *Smith v. Western Electric Co.*<sup>103</sup> At the time of suit, Paul Smith had been employed by Western Electric for more than thirty years. Since 1975, however, Mr. Smith had suffered severe physical reactions when exposed to secondary tobacco smoke. After various complaints and several unsuccessful attempts to alleviate the conditions, Smith's employer

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94. *Id.* at 521, 368 A.2d at 410.

95. *Id.* at 520, 368 A.2d at 410.

96. *Id.* at 521, 368 A.2d at 410.

97. *Id.*

98. *Id.* at 527, 368 A.2d at 414.

99. *Id.* at 528, 368 A.2d at 414.

100. *Id.* at 527, 368 A.2d at 414.

101. *Id.* at 528, 368 A.2d at 414.

102. *Id.* at 530-31, 368 A.2d at 415.

103. 643 S.W.2d 10 (Mo. Ct. App. 1982).

instructed him not to submit any more complaints, for none would be processed.<sup>104</sup> Rather than prohibiting smoking in the work area, Western Electric responded by offering Smith the alternative of wearing a respirator or transferring to the computer room at a \$500 per month pay cut.<sup>105</sup> Unimpressed with the alternatives, Smith filed suit to enjoin Western Electric from breaking its common-law “duty to provide a safe place in which to work.”<sup>106</sup> The trial court granted Western Electric’s motion to dismiss for failure “to state a claim upon which relief can be granted.”<sup>107</sup>

After recognizing Missouri’s acceptance of the employer’s duty and reciting the *Shimp* syllogism,<sup>108</sup> the court of appeals focused on whether an injunction is an appropriate remedy for breach of that duty.<sup>109</sup> The standard for determining the appropriateness of injunctive relief is whether “irreparable harm is otherwise likely to result. . .and [the] plaintiff has no adequate remedy at law.”<sup>110</sup> The *Smith* court held that one may reasonably infer that cigarette smoke is causing the plaintiff irreparable harm, and when a harm’s full effect takes many years to be realized, money damages are inadequate compensation.<sup>111</sup> The plaintiff had stated a cause of action, and his case was remanded for determination on the merits.

In California, *Hentzel v. Singer Co.*<sup>112</sup> extended the possible causes of action for smoking in the workplace beyond the employer’s common-law duty. Paul Hentzel, a former attorney for the Singer Company, alleged he had been fired because of his repeated complaints and demands for a smoke-free workplace.<sup>113</sup> Although he relied tangentially upon *Shimp*,<sup>114</sup> Hentzel based his case on wrongful termination, breach of contract, and, most interestingly, on intentional infliction of

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104. *Id.* at 12.

105. *Id.* Ironically, Western Electric offered Smith the computer room position because smoke is harmful to computers and, therefore, banned only in the computer room. *Id.*

106. *Id.* at 11.

107. *Id.*

108. *Id.* at 12, 13.

109. *Id.* at 13.

110. *Id.* (citations omitted).

111. *Id.*

112. 138 Cal. App. 3d 290, 188 Cal. Rptr. 159 (Cal. Ct. App. 1982).

113. *Id.* at 294, 188 Cal Rptr. at 160.

114. *Id.* at 296 n.2, 188 Cal. Rptr. at 162 n.2.

emotional distress.<sup>115</sup>

On the count of intentional infliction of emotional distress, Hentzel alleged that his employer, knowing of Hentzel's desire for a reasonably smoke-free environment, . . . place[d] him in a working area with a heavier concentration of smoke. . . failed to segregate conference rooms into smoking and non-smoking areas, and failed to prevent other employees from 'directly antagonizing, him in various ways. . . .'<sup>116</sup> The trial court dismissed the complaint on the grounds that the California Workers Compensation Act preempted the cause.<sup>117</sup> However, the court of appeals reversed, stating that intentional infliction of emotional distress was neither contemplated by, nor included in, the workers' compensation law.<sup>118</sup> As long as the recovery sought is beyond the scope of compensation covered by workers' compensation law, a suit may be maintained. Therefore, Hentzel's complaint had stated a cause of action for the intentional infliction of emotional distress.<sup>119</sup>

Of course, not every complaining nonsmoker has achieved success. The recent case of *Gordon v. Raven Systems and Research, Inc.*<sup>120</sup> from the District of Columbia is the *Shimp* antithesis. Like the plaintiffs in *Shimp*, *Smith*, and *Hentzel*, Adel Gordon informed her employer of her sensitivity to tobacco smoke and her desire to be free from such smoke during working hours. Her employer's attempts to accommodate her fell short of preventing smoking in the workplace and, therefore, failed to assuage Ms. Gordon.<sup>121</sup> Because Ms. Gordon refused to return to her assigned workgroup, continuing instead to work in a secluded area, her employer fired her for insubordination.<sup>122</sup> Ms. Gordon brought suit for wrongful termination and breach of an employer's duty to provide a safe place to work<sup>123</sup>

The court's reasoning in *Gordon* is widely disparate from that in *Shimp*. The *Gordon* court began with the same major premise of the employer's duty to provide a safe workplace, but added that this duty does not require an employer "to adapt his workplace to the *particular*

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115. *Id.* at 294, 188 Cal. Rptr. at 160.

116. *Id.* at 294, 188 Cal. Rptr. at 161.

117. *Id.* at 306, 188 Cal. Rptr. at 169.

118. *Id.*

119. *Id.*

120. 462 A.2d 10 (D.C. 1983).

121. *Id.* at 11, 12.

122. *Id.* at 12.

123. *Id.* at 11.

*sensitivities* of an individual employee. . . .”<sup>124</sup> The court of appeals affirmed the trial court’s directed verdict in favor of defendant Raven Systems by stating, “[w]ithout such duty, appellant can complain of no wrong.”<sup>125</sup> Of course, the implied minor premise of the *Gordon* syllogism appears to be that tobacco smoke is unsafe only to those with particular sensitivities.<sup>126</sup>

The *Gordon* opinion does not completely ignore *Shimp*. The court acknowledged that *Shimp* had taken judicial notice of the hazards of tobacco smoke to everyone, based on expert testimony and scientific studies.<sup>127</sup> Nevertheless, the *Gordon* court distinguished its facts from *Shimp* because the plaintiff Gordon had not produced her own medical evidence of the dangers of tobacco smoke, and because she had pleaded only that the duty was owed to her due to her particular sensitivities.<sup>128</sup> It seems anomalous that the court would deny Gordon relief because tobacco smoke affected her even more adversely than the average person. Perhaps the court would have granted relief had her injury been less dramatic.

Whether the court would have granted Ms. Gordon relief even had she offered scientific and medical evidence that tobacco smoke harms everyone is doubtful. Because she failed to plead these general claims, the court stated, “we need not pass on [*Shimp*’s]. . . suitability as substantive law.”<sup>129</sup> This language may be a subtle indication of an unwillingness to have found *Shimp* persuasive had the court felt compelled to analyze its substance.

An even stronger indication of Ms. Gordon’s doubtful chances for success is the court’s dictum prefacing its discussion. The court first noted: “The issue of nonsmokers’ rights is a relatively new one in American jurisprudence.”<sup>130</sup> The court cited *Gaspar* and other cases denying nonsmokers a constitutional right, and then stated that “the issue of nonsmokers’ rights is one better left to the legislature[;]. . . appellant encourages us to act where the legislature has not, [and] [w]e

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124. *Id.* at 14 (emphasis added). *Gordon* ignores that 34 million Americans are hypersensitive to tobacco smoke. See *supra* text accompanying note 59-62.

125. *Id.* at 15.

126. But see *supra* text accompanying notes 11-77 (tobacco smoke pollution is harmful to everyone).

127. *Gordon*, 462 A.2d at 15.

128. *Id.*

129. *Id.*

130. *Id.* at 14.

decline. . . ."<sup>131</sup>

The *Gordon* decision is troubling for several reasons. The fact that a legislature has not acted on an issue well suited for it is irrelevant when a common-law remedy already exists. Furthermore, even when a legislature does act, the statutory remedy in these situations is usually cumulative to the common-law remedy unless the statute clearly indicates otherwise.<sup>132</sup> Leaving aside its very narrow reading of the plaintiff's complaint, *Gordon* seems to suggest that an existing common-law right can be destroyed by legislative inaction. Certainly the court would not intentionally advocate such a doctrine without support.

## 2. OSHA: Support without Remedy

Contrary to the *Gordon* court's belief in legislative inaction, an argument exists that Congress has codified the common-law duty by enacting the Occupational Safety and Health Act of 1970 (OSHA).<sup>133</sup> Pursuant to its power to control interstate commerce, Congress recognized that "illnesses arising out of work situations impose a substantial burden upon, and. . . [are] a hindrance to, interstate commerce."<sup>134</sup> The purpose of OSHA is "to assure so far as possible. . . safe and healthful working conditions. . . ."<sup>135</sup> The Act defines "occupational safety and health standard" as a condition requiring the adoption of "practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and *places* of employment."<sup>136</sup> This Act, which applies to a wide array of workplaces, provides in section 654(a)(1) that "[e]ach employer shall furnish. . . his employees. . . a place. . . free from recognized hazards that are causing or are likely to cause death or serious physical harm. . . ."<sup>137</sup>

In determining what constitutes a "recognized hazard" under section 654(a)(1), courts have looked at many factors, including condi-

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131. *Id.*

132. *E.g.*, *Isbrandtsen Co. v. Johnson*, 343 U.S. 779 (1952). "Statutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles except when a statutory purpose to the contrary is evident." *Id.* at 783.

133. 29 U.S.C. §§ 651-678 (1976).

134. *Id.* § 651(a).

135. *Id.* § 651(b).

136. *Id.* § 652(8) (emphasis added).

137. *Id.* § 651(a)(1).

tions detectable by human senses or through the aid of instrumentation, and employers' constructive knowledge."<sup>138</sup> *American Smelting and Refining Co. v. Occupational Safety and Health Review Comm'n*<sup>139</sup> holds that section 654(a)(1) encompasses "a health standard recognized nationally for many years."<sup>140</sup> *American Smelting*, similar to the nonsmoking cases, involved levels of lead in the air which were higher than the nationally-recognized safe level. The court found these levels to be within the meaning of "recognized hazard" even though the levels could be detected only through measuring air quality, not through sense detection.<sup>141</sup>

Most offices and workplaces which permit smoking probably contain toxic air levels many times higher than any safe standard,<sup>142</sup> but the Secretary of Labor has not, as yet, promulgated any standard for tobacco smoke.<sup>143</sup> Considering the scientific and medical evidence, the Secretary could reasonably conclude: 1) that the absence of cigarette smoke in the workplace would reduce illness, thus easing the burden on interstate commerce; 2) that this absence could be achieved by adopting reasonable bans on smoking; and 3) that the result would free employees from a recognized hazard.

Although *FENSR*, *Shimp*, *Smith*, and *Hentzel* all discussed OSHA,<sup>144</sup> none could be decided based on OSHA since it is well established that OSHA does not provide a private cause of action.<sup>145</sup> However, in construing the California OSHA, modeled after the federal Act, *Hentzel* held that OSHA is cumulative rather than exclusive of

138. See, e.g., *Usery v. Marquette Cement Mfg. Co.*, 568 F.2d 902 (2d Cir. 1977) (hazardous condition detectable through observation and common sense); *American Smelting & Refining Co. v. Occupational Safety and Health Review Comm'n*, 501 F.2d 504 (8th Cir. 1974) (hazardous condition detectable only through instrumentation); *Otis Elevator Co. v. Occupational Safety & Health Review Comm'n*, 581 F.2d 1056 (2d Cir. 1978) (hazardous condition satisfied if employer should have known).

139. 501 F.2d 504 (8th Cir. 1974).

140. *Id.* at 512.

141. *Id.* at 510-11.

142. See *supra* text accompanying notes 23-29.

143. 28 U.S.C. § 655 (1976) authorizes the Secretary of Labor to set standards based upon a national consensus. But see *Smith*, 643 S.W.2d at 14 (no standard has been set).

144. *FENSR*, 446 F. Supp. at 183; *Shimp*, 145 N.J. Super. at 522, 368 A.2d at 410; *Smith* 643 S.W.2d at 14; *Hentzel*, 138 Cal. App. 3d at 300-301, 188 Cal. Rptr. at 166.

145. See *Taylor v. Brighton Corp.*, 616 F.2d 256 (6th Cir. 1980).

the common law.<sup>146</sup> Indeed, section 653(4) of the federal OSHA makes very clear that OSHA shall neither "supersede . . . [n]or affect. . . the common law. . . ."<sup>147</sup>

The Occupational Health and Safety Act itself, even without a private right of action, is persuasive evidence that Congress accepted the major premise on which the nonsmoking plaintiffs have relied. Therefore, the legislative action the *Gordon* court sought for authority to grant relief may exist in OSHA, demonstrating Congress' desire to provide *everyone* a safe place to work.

### 3. *Relief for the Hypersensitive Nonsmoker*

Other nonsmokers who suffer from extreme physical reactions to secondary tobacco smoke have sought relief as handicapped or disabled persons. For example, in *Vickers v. Veterans Admin.*,<sup>148</sup> the plaintiff Vickers, very sensitive to tobacco smoke, worked in a crowded room with several heavy smokers.<sup>149</sup> Vickers alleged that his sensitivity to tobacco smoke qualified him as a handicapped person under the Rehabilitation Act of 1973,<sup>150</sup> and the district court agreed with this classification.<sup>151</sup> Vickers further alleged that his superiors' animosity toward him and Veterans Administration's failure to provide him a smoke-free workplace constituted discrimination against a handicapped in violation of 29 U.S.C. § 794.<sup>152</sup> The district court disagreed, stating that evidence showed Vickers received promotions, work assignments, and incentives as any other employee,<sup>153</sup> and that Vickers "failed to cite any authority from the decided cases to the effect that the Veterans Administration was under a duty to make 'reasonable accommodations' to plaintiffs' sensitivity to tobacco smoke."<sup>154</sup> This language resembles the *Gordon* court language, but can be distinguished since the duty under

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146. 138 Cal. App. 3d at 301, 188 Cal. Rptr. at 166.

147. 28 U.S.C. § 653(4); *See also Shimp*, 145 N.J. Super. at 522, 368 A.2d at 410.

148. 549 F. Supp. 85 (W.D. Wash. 1982).

149. *Id.* at 88-89.

150. 29 U.S.C. §§ 701-796 (1976 & Supp. V 1981).

151. 549 F. Supp. at 86-87 (relying on language of 29 U.S.C. § 707(7)(B)); *but cf. GASP v. Mecklenburg County*, 42 N.C. App. 225, 256 S.E.2d 477 (N.C. Ct. App. 1979) (nonsmokers are not handicapped).

152. *Vickers*, 549 F. Supp. at 87 (29 U.S.C. § 794 prevents discrimination against those qualifying under the Act as handicapped persons).

153. *Vickers*, 549 F. Supp. at 87.

154. *Id.*

inquiry is the duty to the handicapped, not the duty to all employees to provide a safe work place. The *Vickers* court deliberately states: "This is not an action to determine whether *all* government employees have a right to work in offices which are free from tobacco smoke. It is an action solely to determine whether this one plaintiff has the right to work in an environment wholly free from tobacco smoke."<sup>155</sup>

In *Parodi v. Merit Sys. Protection Bd.*,<sup>156</sup> another hypersensitive nonsmoker sought disability retirement benefits. Under the applicable law at that time "a person [was] totally disabled if unable to perform 'useful and efficient service in grade or class of position last occupied. . .because of. . .injury not due to vicious habits, intemperance, or willful misconduct on his part within five years before becoming disabled.'"<sup>157</sup> Both the Office of Personnel Management and the Merit Systems Protection Board determined Parodi was not disabled. The Ninth Circuit, however, reversed both administrations' determinations<sup>158</sup> stating Parodi is disabled because "[s]he cannot perform her job, not due to choice or bad habits. . . ."<sup>159</sup> The court remanded the case to determine whether a smoke-free work environment is available for her<sup>160</sup>

Several courts have denied nonsmokers' requests for unemployment compensation after the nonsmokers quit work, refusing to work in smoke-filled environments.<sup>161</sup> In *Alexander v. Unemployment Ins. Ap-*

155. *Id.* at 86 (emphasis original).

156. 690 F.2d 731 (9th Cir. 1982).

157. *Id.* at 737 (quoting 5 U.S.C. § 8331(6), which was subsequently replaced with new language in Act of Dec. 5, 1980, Pub. L. No. 96-499, Title IV, § 403(b), 94 Stat. 2606 (codified at 5 U.S.C. § 8337(a) 1981)).

158. 690 F.2d at 732-33.

159. *Id.* at 738.

160. *Id.* at 740.

161. See *Rotenburg v. Industrial Comm'n.*, 42 Colo. App. 161, 590 P.2d 521 (Colo. Ct. App. 1979); *Beecham v. Falstaff Brewing Corp.*, 150 Neb. 792, 36 N.W.2d 233 (1949); *Ruckstuhl v. Commonwealth, Unemployment Compensation Bd. of Review*, 57 Pa. Commw. 302, 426 A.2d 719 (Pa. Commw. Ct. 1981). These cases do not preclude compensation as a matter of law, thereby leaving open the possibility of future success. For example, the *Ruckstuhl* court stated:

Although it is now generally accepted that cigarette smoke may be harmful to smokers and non-smokers alike, we cannot *presume* for unemployment compensation purposes that anyone exposed to cigarette smoke in one's work environment is so physically harmed that a voluntary termination of employment will be automatically justified and unemployment benefits granted. Thus, we must treat this case as any other that involves a voluntary termination for health reasons.



*peals Bd.*,<sup>162</sup> a nonsmoking X-ray technologist quit work because her employer failed to enforce its policy against smoking.<sup>163</sup> The court of appeals affirmed the trial court's mandate to pay her unemployment compensation.<sup>164</sup> The court stated that a nonsmoker "has good cause for rejecting work where cigarette smoke is present because such work is not 'suitable employment' since it would be injurious to her health."<sup>165</sup>

Although *Vickers*, *Parodi*, and *Alexander* provide encouragement for the hypersensitive nonsmoker, these cases did not ban or limit smoking in the workplace. None addressed the *Shimp* issue of the employer's common-law duty to all employees.

#### 4. *Florida Common Law Supports Judicial Activism*

Although no nonsmoking employee cases have yet been reported, the *Shimp* syllogism should work well in Florida. A line of Florida cases recognizes the legal premise, i.e., the employer's duty.<sup>166</sup> The Florida Supreme Court held that the common-law doctrine gives an employer "a positive duty to provide his servant with reasonably safe. . . places to work."<sup>167</sup> Whether a Florida employer has breached this duty is determined by weighing the risk of injury against the utility of the condition.<sup>168</sup> Whatever utility exists, if any exists at all, in allowing high levels of tobacco smoke to permeate the workplace could not possibly outweigh the risk of harm to all employees, including those who smoke.<sup>169</sup>

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57 Pa. Commw. at 302, 426 A.2d at 721 (emphasis added). Without this presumption, a plaintiff has the burden of proving a sufficient health detriment exists justifying termination. *Id.* Because the claimant in *Ruckstuhl* had produced only her doctor's statement that she is allergic to tobacco smoke, the court ruled that she had not met her burden. *Id.* Arguably, a similarly situated plaintiff could prevail under the Pennsylvania law by providing the existing medical evidence demonstrating serious physical harm. See *supra* text accompanying notes 59-62.

162. 104 Cal. App. 3d 97, 163 Cal. Rptr. 411 (1980).

163. *Id.* at 99-100, 163 Cal. Rptr. at 412.

164. *Id.*

165. *Id.* at 100, 163 Cal. Rptr. at 412.

166. See *Camp v. Hall* 39 Fla. 535, 22 So. 792 (1897); *Stearns & Culver Lumber Co. v. Fowler*, 58 Fla. 362, 50 So. 680 (1909); *McGee v. Ed De Brauwere & Co.*, 117 Fla. 859, 162 So. 510 (1935) *Richards Co. v. Harrison*, 262 So. 2d 258 (Fla. 1st Dist. Ct. App. 1972) *cert. denied*, 268 So. 2d 165 (Fla. 1972).

167. *Hicks v. Kemp*, 79 So. 2d 696, 699 (Fla. 1955).

168. *Bartholf v. Baker*, 71 So. 2d 480, 482 (Fla. 1954).

169. See *supra* text accompanying notes 11-77 (reviewing many of the risks of

One may suggest that the utility involves respecting the rights of workers to smoke. On the issue of a safe workplace, however, recognizing smokers' rights may be inappropriate. Even though an employer may wish to respect an individual's desire to assume the risks of tobacco smoking, an argument still exists that the employer has the duty to provide even the smoker with a safe place to work by protecting that individual from tobacco smoke during working hours. This is analogous to an individual who chooses not to wear a seat belt while driving his private car. The employer of this individual still has a positive duty to require that individual to wear a seat belt while operating a dangerous instrumentality on the job. Therefore, the issue is not the rights of smokers versus the rights of nonsmokers in the workplace. The issue is whether the presence of tobacco smoke in the workplace creates an unsafe environment for all workers regardless of anyone's desire to assume the risks of the condition.

A Florida plaintiff has another potential basis for recovery. In addition to the available medical and scientific evidence he can use to establish the harm to any person exposed to tobacco smoke, a complaining party may refer to the preamble of Florida Statutes section 255.27,<sup>170</sup> regulating smoking in state buildings. The preamble states in part: "[E]ven low levels of tobacco smoke in stagnant room air constitutes a *substantial* health hazard. . . , and. . . [the nonsmoker's] right to be free of annoying and possibly harmful tobacco smoke. . . should be protected. . . ."<sup>171</sup> Even though the plaintiff may not be invoking Florida Statutes section 255.27, the preamble is still useful as persuasive authority. Preambles demonstrate, at the very least, the legislature's concern, intent, and purpose in enacting legislation.<sup>172</sup>

To avoid the *particular sensitivity* basis for rejection of Ms. Gordon's complaint,<sup>173</sup> the Florida plaintiff must plead the harm of tobacco smoke to everyone exposed to it, and produce scientific affidavits. In addition, he should refer to the third paragraph of the section 255.27 preamble which states, "persons with allergies, respiratory ailments, and other related infirmities are adversely affected by tobacco

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harm).

170. FLA. STAT. § 255.27 (1983).

171. 1977 Fla. Laws 73, ch.77-52 (emphasis added).

172. For a discussion of the various effects and uses of preambles, see Note, *Legal Effect of Preambles—Statutes*, 41 CORNELL L.Q. 134 (1955).

173. See *supra* text accompanying note 124. Pleading particular sensitivity was Ms. Gordon's nemesis.

smoke which results in the state and private industry incurring each year substantial losses in productivity due to days lost by personnel, not to mention the personal suffering and inconvenience of those affected. . . ."<sup>174</sup> Perhaps this language provides the nexus and authority the *Gordon* court believed it lacked to extend the common-law duty to include those with particular sensitivities.

#### IV. Florida's Need for a Clean Indoor Air Act

Both *Gordon v. Raven Systems and Research, Inc.*,<sup>175</sup> and *Federal Employees for Nonsmokers' Rights (FENSR) v. United States*<sup>176</sup> suggest that the issue of defining nonsmokers' rights should be determined by a legislative body rather than a court.<sup>177</sup> While the more accurate view is that a court has the power to recognize the rights of nonsmokers under existing laws and should not hesitate to do so when called upon, the legislature is undoubtedly the better forum to define those rights. Before 1974 no state had ever enacted comprehensive smoking regulations designed to assure air quality or protect the health of those who do not smoke.<sup>178</sup> What regulations did exist were usually designed for fire or explosion prevention or for the protection of minors.<sup>179</sup> Only after publication of the 1972 Surgeon General's report and subsequent medical studies did legislatures have reason to begin recognizing rights of nonsmokers. Since then, however, the movement towards legislative recognition of these rights gained rapid momentum. Between 1974 and 1980 twenty-five states enacted comprehensive anti-smoking statutes designed to protect nonsmokers from involuntary exposure to harmful tobacco smoke,<sup>180</sup> three states enacted piecemeal groups of anti-smok-

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174. 1977 Fla. Laws 73, ch. 77-52.

175. 462 A.2d 10 (D.C. 1983).

176. 446 F. Supp. 181 (D.D.C. 1978), *aff'd*, 598 F.2d 310 (2d Cir. 1979), *cert. denied*, 444 U.S. 926 (1979).

177. *Gordon*, 462 A.2d at 14; *FENSR*, 446 F. Supp. at 185.

178. See Comment, *The Legal Conflict Between Smokers and Nonsmokers: The Majestic Vice Versus the Right to Clean Air*, 45 Mo. L. Rev. 444, 452 (1980) [hereinafter cited as *Legal Conflict*].

179. *Id.* at 453.

180. *Id.* at 451, 452.

ALASKA STAT. §§ 18.35.300, .310, .320, .330, .340 (Cum. Supp. 1979); ARIZ. REV. STAT. ANN. § 36-601.01 (1974); ARK. STAT. ANN. §§ 82-3701 TO -3703 (Cum. Supp. 1979); COLO. REV. STAT. §§ 25-14-101 to -105 (Cum. Supp. 1978); (1977); CONN. GEN. STAT. ANN. §§ 1-21b (West Cum. Supp. 1980); GA. CODE ANN § 26-9910 (1977); HAWAII

ing statutes,<sup>181</sup> and seven states enacted laws protecting nonsmokers' rights in very limited areas.<sup>182</sup> Thirteen other states still had restrictions for traditional reasons,<sup>183</sup> and three states had no restrictions.<sup>184</sup>

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REV. STAT. §§321-201 to -206 (1976); IOWA CODE §§ 98A.1-6 (Supp. 1980); KAN. STAT. ANN. §§ 21-4008 (Cum. Supp. 1979); MASS. GEN. LAWS ANN. ch. 270, §21 (West Cum. Supp. 1980); MINN. STAT. ANN. §§ 144.411-417 (West Supp. 1980); 1979 Mont. Laws ch. 368; NEB. REV. STAT. §§ 71-5701 to -5713 (Supp. 1979); NEV. REV. STAT. §§ 202.2490-.2492 (1975); N.H. REV. STAT. ANN. § 155.42 (Supp. 1979); N.J. REV. STAT. § 2C:33-13 (Supp. 1979); N.Y. PUB. HEALTH LAW §§ 1399-o to -q (McKinney Supp. 1979); N.D. CENT. CODE §§ 23-12-09 to -11 (1978); OHIO REV. CODE ANN. § 379.031 (Page Supp. 1979); OKLA. STAT. ANN. tit. 21, § 1247 (West Supp. 1979); R.I. GEN. LAWS §§ 23-56-1, -2 (CUMM. SUPP. 1978); S.D. CODIFIED LAWS ANN. §§ 22-36-1, -2 (1979); TEX. PENAL CODE ANN. tit. 10, § 48.01 (Vernon Supp. 1979); UTAH CODE ANN. §§ 76-10-101 to -110 (Cum. Supp. 1975); 248 WAC 152 (1975) (Washington state regulations).

*Legal Conflict, supra* note 178, at 450 n.57.

181. *Legal Conflict, supra* note 178, at 452.

MD. ANN. CODE art. 38A, § 23 (1957) (fireworks), art. 43, § 54-I (1957) (physicians' offices, nursing homes, hospitals), art. 43, § 200 (1957) (food canning), art. 78, § 35A (Supp. 1979) (buses), art. 89, § 64 (1957) (elevators); MICH. COMP. LAWS §§ 333.21333 (1980) (homes for the aged), 333.21531 (1980) (hospitals), 333.21733 (1980) (nursing homes), 408.820 (Supp. 1980) (elevators), 289.707a (Supp. 1980) (retail food establishments), 333.12905 (1980) (restaurants), 289.129 (1967) (canneries); OR. REV. STAT. §§ 243.345, .350 (1979) (state offices), 192.710 (1979) (public meetings), 441.815 (1979) (hospitals), 479.015 (1979) (elevators).

*Legal Conflict, supra* note 178, at 451 n.57.

182. *Legal Conflict, supra* note 178, at 452

CAL. HEALTH & SAFETY CODE §§ 25940, 25940.5, 25941 to 25947 (West Supp. 1980) (certain areas in publicly owned buildings); CAL. PUB. UTIL. CODE § 561 (West Supp. 1980) (public transportation) (California's Clean Indoor Air Act, ch.10.7, was rejected at the general election held Nov. 7, 1978); DEL. CODE ANN. tit. 11, § 1326 (1979) (buses); D.C. CODE ANN. § 44-216 (Supp. 1978) (public transportation); IDAHO CODE §§ 18-5904 to -5906 (1979) (public meetings); MISS. CODE ANN. § 97-35-1(4), (7) (1972) (buses); PA. STAT. ANN. tit. 35, § 361 (Purdon Supp. 1980) (hospitals); PA. STAT. ANN. tit. 53, § 3702 (Purdon 1972) (retail stores); PA. STAT. ANN. tit. 35, § 1225 (Purdon 1977) (theatres, public assemblies); WASH. REV. CODE ANN. § 47.56.730 (Supp. 1980) (ferries).

*Legal Conflict, supra* note 178, at 451 n.57.

183. *Legal Conflict, supra* note 178, at 452

ILL. ANN. STAT. ch. 96 ½, § 2105 (Smith-Hurd 1979) (mines); ILL. ANN. STAT. RECOVERY CH.127 ½, § 109 (SMITH-HURD CUM. SUPP. 1976) (FIREWORKS); IND. CODE ANN. §§ 16-1-22-21, 16-6-4-23 (BURNS 1973) (FOOD

Not surprisingly, states in or near the tobacco belt generally fall into the latter two categories.

### A. Smokers' and Nonsmokers' Rights Distinguished

As discussed in section three of this note, apparently the fundamental rights afforded under the United States Constitution do not include the right to a smoke-free environment.<sup>185</sup> Likewise, of course, there is no fundamental right to smoke tobacco. In other words, neither the smoker nor the nonsmoker can rely directly on the Constitution to resolve the conflict. The state and local governments may, however, use their police power to define and regulate the rights of smokers and nonsmokers. Nothing is more vital to a state than the health, safety and welfare of its citizens.

A suggestion made earlier is that when applying the common-law doctrine of the employer's duty, comparing nonsmokers' and smokers' rights may be improper since the hazardous condition rather than competing rights is at issue.<sup>186</sup> In legislating, however, comparing the rights of smokers and nonsmokers is a proper consideration since the competing rights are at issue.

Freedom is a basic presumption of our society. Generally, individ-

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PROCESSED OR STORED); KY. REV. STAT. ANN. § 352.170(3) (Baldwin 1977) (mines); KY. REV. STAT. ANN. § 438.050 (Baldwin Cum. Supp. 1978) (school premises); LA. REV. STAT. ANN. § 17:416(a) (West Supp. 1980) (school premises); ME. REV. STAT. ANN. tit. 25, § 2433 (1964) (mills, buses, factories, shipyards; fire prevention in mind); RSMo § 320.130 (1978) (fireworks); N.M. STAT. ANN. §§ 63-7-2, -3, 63-14-17 (1974) (mines); S.C. CODE §§ 23-35-90, -100 (1976) (fireworks); S.C. CODE § 59-67-150 (1976) (school bus); TENN. CODE ANN. § 53-3011 (1977) (fireworks); TENN. CODE ANN. § 59-6-103(B), 09(J), -510(A), -7-106 (1980) (MINES); TENN. CODE ANN. §§ 59-7-108(h) (1980) (magazine); VT. STAT. ANN. tit. 20, § 2752 (1968) (building with sign posted; fire prevention measure); V.A. CODE § 3.1-379 (1973) (food processing); V.A. CODE § 45.1-39 (1974) (MAGAZINES); V.A. CODE § 45.1-98 (1974 & Cum. Supp. 1979) (mines); W. VA. CODE § 21-3-8 (1978) (factories, mercantile establishments); W. VA. CODE § 16-9-7 (1979) (schools); W. VA. CODE § 22-2-57(b) (1978) (mines); W. VA. CODE § 22-2-53 (1978) (mine surface); WYO. STAT. § 30-6-107 (1977) (mines).

*Legal Conflict*, *supra* note 178, at 451 n.57.

184. *Legal Conflict*, *supra* note 178, at 452. "Alabama, North Carolina, and Wisconsin." *Legal Conflict*, *supra* note 178, at 451 n.57.

185. *See supra* text accompanying notes 78-92.

186. *See supra* text following note 169.

uals have the right to engage in lawful activities and to use their own free will and discretion in determining the extent of that engagement. This right includes the right to take risks. Nevertheless, the right of personal autonomy is not absolute.<sup>187</sup> Not only may a state regulate, restrict or even prevent an otherwise lawful activity if the regulation bears any rational relationship to a legitimate state interest;<sup>188</sup> a state may also impinge a fundamental right if the restriction is necessary to further a compelling state interest.<sup>189</sup> Presently the smoking of tobacco products is a lawful activity, but probably not a fundamental right. Therefore, a state may restrict or prevent the right to smoke if the prevention or restriction is rationally related to furthering a legitimate state interest. The health, safety, and well-being of citizens is at the very least a legitimate state interest.<sup>190</sup>

Once a legislature recognizes the scientific and medical evidence that secondary smoke is a health hazard, the question is not whether smoking should be restricted, but *where* and *when*.<sup>191</sup> The simple answer is by whatever regulation is reasonably designed to enhance the goal of protecting the health, safety and well-being of the citizens. Perhaps the most reasonable general rule is that individuals should have the right to smoke only when and where the act does not endanger the health and safety of others. Certainly this is exactly the standard used in other types of legislation. For example, individuals may lawfully operate motor vehicles, but only under clearly-defined conditions which vary according to place and time and under the threat of penalties for violations. The restrictions extend from the rationale that individuals have the right to operate motor vehicles only to the extent they do so without endangering the safety of others. The rationale of anti-smoking laws should be commensurate with this. The rights of smokers to endanger their own bodies should end when their acts begin to endanger

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187. *Crowley v. Christensen*, 137 U.S. 86, 89-90 (1890); *Roe v. Wade*, 410 U.S. 113, 154 (1973); *see also Kelley v. Johnson*, 425 U.S. 238 (1976) (even one's hair length may be regulated).

188. *See Dandridge v. Williams*, 397 U.S. 471, 485-86 (1970) (discussing the rational basis-legitimate interest standards).

189. *See, e.g., Roe v. Wade*, 410 U.S. 113, 155 (1973) (discussing the higher level of strict scrutiny applied to fundamental rights).

190. *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264 (1981) states: "Protection of health and safety of the public is a paramount governmental interest. . . ." *Id.* at 300.

191. *See, e.g., N.J. STAT. ANN. §§ 26:3D-1,7,15* (West Supp. 1984) (emphasis added).

others. Some states have implemented this rationale by passing Clean Indoor Air Acts; others, like Florida, have not.

## B. The Inadequacy of Present Legislative Measures

Florida has two statutes designed to restrict smoking. One must hesitate to describe them as anti-smoking statutes since neither affords great protection from tobacco smoke.

### 1. *Florida Statutes Section 823.12*

Florida Statutes section 823.12<sup>192</sup> makes smoking in elevators a second degree misdemeanor. Of course, because there is rarely any prohibition against smoking before getting on an elevator or after getting off, the law is often ignored. At least one person, however, received a \$250 fine for blowing smoke in the face of another elevator occupant who had requested that he extinguish his cigar.<sup>193</sup> This is a good law, but in the absence of other restrictions, it does little to promote public health. People spend a small fraction of their time on elevators.

### 2. *Florida Statutes Section 255.27*

Florida Statutes section 255.27,<sup>194</sup> enacted in 1977, represents Florida's first real attempt at anti-smoking legislation. The statute's preamble in very strong language recognizes: 1) the potential health hazard of "even *low* levels of tobacco smoke. . ." 2) the "right to be free of. . .tobacco smoke. . ." and 3) the potential loss of worker productivity from exposure to tobacco smoke.<sup>195</sup> The statute itself, however, falls far short of the preamble's stated aspirations. Under this statute, "[t]he supervisor of each unit of government located in a government building shall establish rules governing smoking in that portion of the building for which he is responsible."<sup>196</sup>

Section 255.27 gives the government supervisor guidelines to follow, but these guidelines appear more permissive of smoking than restrictive. For example, in conference rooms and auditoriums,

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192. FLA. STAT. § 823.12 (1983).

193. *Legal Conflict*, *supra* note 178, at 458 (citing Good Housekeeping, Apr. 1979, at 118).

194. FLA. STAT. § 255.27 (1983).

195. 1977 Fla. Laws 73, ch. 77-52 (emphasis added).

196. FLA. STAT. § 255.27 (1983).

“[s]eparate smoking and nonsmoking *areas* shall be set aside.”<sup>197</sup> This means smoking is still permitted in these rooms, only not on certain sides. Considering the physical qualities of tobacco smoke and how it rapidly permeates a room, one realizes that dividing a room provides no real protection.<sup>198</sup> Furthermore, “[t]here will be no limitation on smoking in corridors, lobbies, and restrooms.”<sup>199</sup> Common sense suggests that these areas are often the smallest and least ventilated of a building. Unless nonsmokers who use or work in state buildings can miraculously avoid these areas, they are assured of exposure to high levels of tobacco smoke.

In fact, Florida Statutes section 255.27 does not guarantee that individuals will be totally free from tobacco smoke in any area. In medical care facilities smoking is “restricted to staff, lounges, private offices, and *specially designated areas*.”<sup>200</sup> Apparently, this “specially designated areas” language permits a supervisor to divide all open rooms into smoking and nonsmoking sides, thereby creating the same problem as discussed with conference rooms. In designating nonsmoking areas, the supervisor is required to consider only “the individual characteristics of the building or room such as size, ventilation, the purposes for which it is utilized, and other criteria relating to public health, safety and comfort.”<sup>201</sup> The law does not guarantee that any area will be absolutely void of tobacco smoke.

Florida Statutes section 255.27 suffers from two other even greater deficiencies. First, the law does not provide penalties for violations. Secondly, whatever smoking restrictions do exist for the protection of public health apply only in state government buildings or offices leased by the state government. No other public places are affected.

In short, the Florida Legislature formally recognizes that tobacco smoke is a serious public health hazard only when inhaled in certain unspecified areas of state government buildings. However, it is doubtful that the toxic effect of tobacco smoke discriminates in such a manner. Florida should recognize, as other states have, that tobacco smoke is a detriment to public health and welfare regardless of where or when

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197. *Id.* § 255.27(1) (emphasis added).

198. Lefcoe, Ashley, Pederson & Keays, *The Health Risks of Passive Smoking and the Growing Case for Control Measurements in Enclosed Environments*, 84 CHEST, July 1, 1983, at 93 (smoke permeates entire room.).

199. FLA. STAT. § 255.27(3) (1981).

200. *Id.* § 255.27(2) (emphasis added).

201. *Id.* § 255.27(4).



inhaled. Florida needs to follow through to the logical conclusion of its declarations stated in the preamble to Florida Statutes section 255.27 and enact a comprehensive Clean Indoor Air Act.

### C. Elements to be Included in Florida's Comprehensive Legislative Response

Like any effective legislation, anti-smoking legislation must make a clear statement of its intent and purpose, define terms, places, and conditions under which smoking will be permitted, require adequate posting of regulations, authorize individuals and agencies to enforce the regulations, and provide adequate penalties for violations.<sup>202</sup> This section discusses these elements and illustrates how some selected anti-smoking laws have employed them. In addition, this section raises a new issue concerning legislative protection of children from passive smoking. The Florida Legislature should use the discussion as a guide and should satisfy all elements in its Clean Indoor Air Act.

#### 1. *Intent and Purpose*

Effective legislation should make clear the reasons and intent of the restrictions. Such a statement is useful for interpretation and implementation of restrictions. The best method is to incorporate the intent as part of the statute. For example, Colorado Revised Statutes section 24-14-101 states: "Legislative declaration. The general assembly hereby declares that the smoking of tobacco. . . under certain conditions is a matter of public concern and that in order to protect the public health, safety and welfare it is necessary to control such smoking in certain public places."<sup>203</sup>

Perhaps the strongest statement of purpose of any anti-smoking legislation appears in the newly-enacted city of San Francisco's Smoking Pollution Control Ordinance.<sup>204</sup> Section 1001 of this ordinance states:

Because the smoking of tobacco . . . is a danger to health and is a

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202. See PUBLIC HEALTH SERVICE, U.S. DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, *THE SMOKING DIGEST* 83 (1979) [hereinafter cited as *SMOKING DIGEST*].

203. COLO. REV. STAT. § 245-14-101 (1982).

204. SAN FRANCISCO, CAL., MUN. CODE part II, ch. V, art. 19 §§ 1000-05 (1983).

cause of material annoyance and discomfort . . . , the purposes of this article are (1) to protect the public health and welfare by regulating smoking in the office workplace and (2) to minimize the toxic effects of smoking. . . by requiring an employer to adopt a policy that will accommodate, insofar as possible, the preferences of nonsmokers and smokers and, if a satisfactory accommodation cannot be reached, to prohibit smoking in the office workplace.<sup>205</sup>

The section further emphasizes that the ordinance does not “create any right to smoke . . . ,”<sup>206</sup> nor does it prevent an employer from banning smoking altogether.<sup>207</sup> The spirit of the ordinance merely allows an employer to attempt satisfying all employees, smokers, and nonsmokers. However, this attempt at accommodating everyone does not imply striking a balance or compromise. On the contrary, the ordinance makes very clear that the right to be free from smoke is superior to the right to smoke.<sup>208</sup> Any smoking policy set by an employer must satisfy *all* nonsmoking employees.<sup>207</sup>

## 2. Definitions and Restrictions

Most essential to any clean indoor air act are its definitions and restrictions. Enforcement of any regulation requires knowing exactly what is restricted and where it is restricted. For example, the term smoking requires precise definition. Because the most harmful smoke emanates from the burning ends of tobacco products and equipment, the definition of “smoking” should include not only inhaling and exhaling but also the burning or carrying of any lighted tobacco or other smoking product.<sup>210</sup> Other important terms include public place, public meeting, office, workplace, building, and enclosed area.<sup>211</sup> It may even be appropriate to define for purposes of protecting children, “private home” and “automobile.”<sup>212</sup>

Of course, the actual regulations are the most critical. Many anti-smoking regulations enumerate areas where smoking is prohibited.<sup>213</sup>

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205. *Id.* at § 1001.

206. *Id.*

207. *Id.*

208. *Id.* § 1003(1)(b).

209. *Id.* (emphasis added).

210. *See, e.g.,* COLO. REV. STAT. § 25-14-102(3) (1982).

211. *Id.*

212. *See infra* text accompanying notes 236-42.

213. *See, e.g.,* Colo. Rev. Stat. § 25-14-103 (1982).

The most common areas listed include elevators, theaters, libraries, buses, waiting rooms, government buildings, schools, etc.<sup>214</sup> While these lists have the benefit of making the restricted areas somewhat clear, their exclusionary method unfortunately promulgates the traditional presumption that smoking is permitted anywhere unless otherwise provided.

The Minnesota Clear Indoor Air Act,<sup>215</sup> the leading comprehensive state statute to date, takes a refreshing approach. Minnesota Statutes section 144.414 states, "[n]o person shall smoke in a public place or at a public meeting except in designated smoking areas."<sup>216</sup> The Act defines a public place "as any enclosed, indoor area used by the general public or serving as a place of work . . . ."<sup>217</sup> In effect, the Minnesota Clean Indoor Air Act reverses the traditional presumption. Smoking is prohibited in public unless an area has been set aside for smoking. Nonsmokers are assured of clear indoor air in common, public areas, but some areas may be set aside for smoking if certain precautions are taken. This approach is the most reasonable, and one Florida should follow.

The Minnesota Act exempts some areas. Private enclosed offices are not subject to the restriction, and neither are "factories, warehouses and similar places of work not usually frequented by the general public, *except* that the [labor department and . . . health commissioner]. . . shall establish rules to restrict or prohibit smoking. . . where the close proximity of workers or inadequacy of ventilation causes smoke pollution. . . ."<sup>218</sup> Furthermore, the Minnesota section providing for designation of smoking areas requires the use of "physical barriers and ventilation systems. . . to minimize the toxic effect of smoke in adjacent non-smoking areas."<sup>219</sup>

The controversial San Francisco ordinance requires office employers operating businesses within the city to establish and enforce a written smoking policy.<sup>220</sup> As discussed earlier, employers may attempt to accommodate smokers, but if ventilation or separation is insufficient to protect all nonsmokers, total abolition of smoking is required.

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214. *Id.*

215. MINN. STAT. ANN. § 144.411 (West Supp. 1983).

216. *Id.* § 144.414.

217. *Id.* § 144.413.(2)

218. *Id.* § 144.414 (emphasis added).

219. *Id.* § 144.415.

220. SAN FRANCISCO, CAL., MUN. CODE part II, ch. V, art. 19 § 1003 (1983).

### 3. Enforcement

A major problem with anti-smoking legislation is the lack of adequate enforcement provisions.<sup>221</sup> Of course, most people obey laws; therefore, the mere enactment of an anti-smoking law coupled with greater public awareness of the reasons and purposes of the law may achieve substantial public compliance. But more is needed. While one has difficulty imagining police officers using smoke detectors to catch recalcitrant tobacco smokers as they use radar to catch speeding motorists, effective anti-smoking laws do require adequate and enforceable fines and penalties.

Enforcement provisions vary greatly, even among states with extensive anti-smoking laws.<sup>222</sup> For example, although the Colorado statute gives a strong anti-smoking declaration, defines essential terms, lists extensive restrictions for certain public places, creates optional prohibitions, and makes clear that local governments may regulate even more extensively than the state statute, it fails to provide a section for enforcement.<sup>223</sup> Several states have made a violation a petty misdemeanor.<sup>224</sup> Alaska may fine an individual violator of its anti-smoking act between \$5 and \$25,<sup>225</sup> and managers of buildings or others responsible for enforcing restrictions may be fined between \$10 and \$100.<sup>226</sup> New Jersey fines individuals up to \$100, and fines those responsible with enforcement \$25 for the first offense, \$100 for the second, and \$200 for each offense thereafter.<sup>227</sup>

Sometimes statutes make clear who may enforce the restrictions and by what methods. The California Clean Indoor Air Act,<sup>228</sup> for example, permits an individual to apply for a writ of mandate to comply with the restrictions.<sup>229</sup> If the plaintiff is successful, not only must the entity enforce the restrictions, but the plaintiff will also receive reason-

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221. SMOKING DIGEST, *supra* note 202, at 84.

222. *Id.* at 84-86.

223. COLO. REV. STAT. § 25-14-101 (1982).

224. See e.g., MINN. STAT. ANN. § 144.417 (West Supp. 1983); NEB. REV. STAT. § 71-5712 (1981) (Nebraska's Clean Indoor Air Act is almost identical to Minnesota's.).

225. ALASKA STAT. § 18.35.340(a) (1982).

226. *Id.* § 18.35.340(b). Proprietors must also post conspicuous no smoking signs. *Id.* § 18.35.330.

227. N.J. STAT. ANN. §§ 26:32D-4,12,20 (West Supp. 1984).

228. CAL. HEALTH & SAFETY CODE § 25940 (Deering Supp. 1983).

229. *Id.* § 25945.

able costs and attorney's fees.<sup>230</sup> Other statutes provide that an "affected party" may file suit to enjoin violators.<sup>231</sup>

The San Francisco ordinance appears to have the strictest enforcement provisions. Employers who fail to institute and enforce a written smoking policy which satisfies all nonsmokers may receive up to a \$500 fine.<sup>232</sup> In addition, "[e]ach day such violation is committed or permitted to continue shall constitute a separate offense and shall be punishable as such."<sup>233</sup> The enforcement provision also requires the Director of Public Health to enforce the ordinance by serving notices to violators and having the city attorney sue to enjoin violators.<sup>234</sup>

The San Francisco ordinance takes a serious approach to enforcing an otherwise easy-to-ignore ordinance. Most nonsmokers find it difficult to speak up about violations. Many would rather suffer the health consequences and annoyance than risk alienation. Under this ordinance suits are brought in the name of the city rather than an individual employee.<sup>235</sup> The burden is on the employer to institute and enforce a policy on behalf of the nonsmokers. Knowledge of the potential for huge fines for continued violations makes what is good for the nonsmoker good for the employer.

#### 4. *Protection for Children*

In her cover letter submitting the 1980 Surgeon General's report to the House of Representatives, Patricia Roberts Harris, Secretary of Health, Education and Welfare, stated: "Perhaps more disheartening [than the harm tobacco smoke has on women] is the harm which mothers' smoking causes to their unborn babies and infants."<sup>236</sup> A possible emerging issue is whether parental smoking should be restricted to times when and places where children are not present. Arguably a relationship between parental smoking in the child's environment and the negligent treatment of children exists. Florida's negligent treatment of

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230. *Id.*

231. *See, e.g.,* MINN. STAT. ANN. § 144.417(3) (West Supp. 1983).

232. SAN FRANCISCO, CAL., MUN. CODE part II, ch. V, art. 19 § 1005(2) (1983).

233. *Id.*

234. *Id.* § 1005(1).

235. *Id.* § 1005(2).

236. Letter from Patricia Roberts Harris to Speaker Thomas P. O'Neill, Jr. (printed inside front cover of PUBLIC HEALTH SERVICES, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, THE HEALTH CONSEQUENCES OF SMOKING FOR WOMEN (1980)).

children statute provides in part: "Whoever permits a child to live in an environment. . .[which] causes the child's physical or emotional health to be. . .in danger of being significantly impaired shall be guilty of a misdemeanor of the second degree. . . ." <sup>237</sup> Medical evidence demonstrates that children who live in smoke-filled homes are in danger of significant physical impairment. <sup>238</sup>

Although a government walks on thin ice when it attempts to regulate parental control and management of their children, the serious detrimental effect parental smoking has on children arguably should not be ignored. On the one hand is the traditional notion of the right of parents to raise their children without state interference. <sup>239</sup> On the other hand, states are enacting legislation designed to protect non-smokers, and yet no provisions exist to protect children, the group of nonsmokers who may be in most need of protection. The Supreme Court has stated: "we have recognized that a state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized." <sup>240</sup> In the same opinion the Court stated, "[t]he statist notion that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect children is repugnant to American tradition." <sup>241</sup>

The dilemma is not easily resolved. It would be unrealistic to expect Florida agencies to prosecute parents who smoke cigarettes in their own homes, whether under the child neglect statute or otherwise. It is realistic, however, to expect Florida to protect children by educating the public and focusing attention on the harm passive smoking has

237. FLA. STAT. § 827.05 (1983).

238. See *supra* text accompanying notes 62-75 for a review of medical evidence of harm to children from passive smoking.

Additionally, it could be argued that the dangers to children rise to the level of child abuse. FLA. STAT. § 827.04(2) (1983) states: "Whoever . . . knowingly or by culpable negligence, permits physical or mental injury to the child, shall be guilty of a misdemeanor of the first degree. . . ." Also, FLA. STAT. § 827.04(1) (1983) states: "Whoever . . . knowingly or by culpable negligence, permits physical injury to the child, and in so doing causes great bodily harm, permanent disability, or permanent disfigurement to such child, shall be guilty of a felony of the third degree. . . ." *Id.*

239. *Parham v. J.R.*, 442 U.S. 584, 601-02 (1979); *Prince v. Massachusetts*, 321 U.S. 158, 165-66 (1944). In *Prince*, the Court spoke of "the parent's claim to authority in her own household and in the rearing of her children." 321 U.S. at 165. "Against these sacred private interests, basic in a democracy, stand the interest of society to protect the welfare of children. . . ." *Id.*

240. *Parham*, 442 U.S. at 603.

241. *Id.* (emphasis original).

on children. One of the many ways this may be accomplished is to include a provision in a Clean Indoor Air Act advising parents and other adults not to smoke in enclosed areas when children are present, for example, the home and automobile. Even without active enforcement, such a provision may open "those pages of human experience that teach that parents generally do act in the child's best interest."<sup>242</sup>

### 5. *Proposal*

A Florida Clean Indoor Act should include a clear statement of intent and the following minimum protections: 1) prohibit smoking in all places open to the public, exempting only designated rooms where nonsmokers realistically need not be present; 2) guarantee all nonsmokers a smoke-free workplace; 3) provide adequate enforcement and penalty provisions; and 4) lead the nation in protecting the health of infants by restricting parental smoking in areas when children are present. The act should permit municipalities to place further restrictions on smoking, but not permit them to create exemptions.

## V. Conclusion

Twenty years ago the United States Surgeon General officially informed the public of the dangers of tobacco smoke. Since that first report, hundreds of medical studies have linked tobacco smoke to a multitude of serious illnesses, and today tobacco smoking is recognized as the number one cause of premature death and disability in America.<sup>243</sup> Included in these findings is the discovery that secondary tobacco smoke pollutes the air and is a significant health hazard to nonsmokers. Using this as an underlying premise, nonsmokers have sought legal remedies in their campaign for clean air. Nonsmokers do not attack the privilege of smokers to assume the risks of tobacco smoking. The issue nonsmokers present is whether an individual has the right to take a risk which concomitantly involves an unavoidable risk of harm to others near him. Nonsmokers argue that the privilege to smoke, as with any other privilege, must end when its exercise endangers the health and safety of others. Smokers should have the burden to smoke only in areas where nonsmokers are not present. The free

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242. *Id.* at 602.

243. PUBLIC HEALTH SERVICE, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, *THE HEALTH CONSEQUENCES OF SMOKING: CARDIOVASCULAR DISEASE* 11 (1st ed. 1983).

choice of one should not take away the free choice and good health of another.

Although no court has yet recognized a constitutional right to be free from the dangers of tobacco smoke exposure, some nonsmokers have achieved smoke-free workplaces under the employer's common-law duty to provide each employee a safe place to work. While piecemeal remedies through the courts applying this theory hold promise, the better forum for granting relief is the legislature. In 1964 only half of the population believed smoking should be restricted in certain places, but in 1975 seventy percent favored controls.<sup>244</sup> In all likelihood that figure is even larger today. Responding to the medical evidence and desire of the majority, half of the states have enacted comprehensive legislation prohibiting smoking in public places. Regrettably, Florida has not. Pursuant to its power and duty to protect the health and welfare of its citizens, the Florida Legislature should enact a Florida Clean Indoor Air Act.

*Curtis R. Cowan*

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244. SMOKING DIGEST, *supra* note 202, at 8.